IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

PIL WRIT PETITION (LODGING) NO. 45 OF 2007

Prof. Krishnaraj Goswami, Advocate,)
Resi. Building No. 36, Panchayatiwadi Lane)
Bhuleswar, Mumbai.)..Petitioner

versus

1. The Reserve Bank of India)
through Chairman, R.B.I. Fort,)
Bombay-1.)

2. Union of India,)
Through the Secretary, Ministry of Finance,)
North Block, New Delhi)
& Mantralay Building, Bombay.)

3. Security and Exchange Board of India,)
Through Chairman, SEBI House,)
Bandra Kurla Complex, Bombay.)

4. National Stock Exchange of India Ltd.)
through Secretary, NSE House, Bombay.)..
Respondents

Mr. M.L. Sharma for the petitioner.
Mrs. Poornima Advani with Ms. Sejal Shah for respondent No.3.
Mr. Aspi Chinoy, Senior Advocate, with Mr. V.K. Ramabhadran for respondent No. 4.

CORAM: **SWATANTER KUMAR, C.J.** &
DR. D.Y. CHANDRACHUD, J.

Judgment reserved on : August 08, 2007
Judgment delivered on: August 23, 2007

JUDGMENT (Per Swatanter Kumar, C.J.):

On 22nd December, 2006, the Reserve Bank of India issued the following circular.

"RESERVE BANK OF INDIA

Date: Dec 22, 2006

Foreign investment in Infrastructure Companies in Securities Markets.

RBI/2006-07/218
A.P. (DIR Series) Circular No.25

December 22,2006

To

All Category-1 Authorised Dealer Banks.

Madam/Sir,

Foreign investment in infrastructure Companies in Securities Markets – Amendment to the Foreign Direct Investment Scheme.

Attention of Authorised Dealer Category – 1 (AD Category -1) banks is invited to Schedule 1 to Foreign Exchange Management (Transfer or issue of Security by a Person Resident Outside India) Regulations, 2000, notified vide FEMA Notification No. 20/2000-RB dated May 3, 2000, as amended from time to time.

2. It has been decided in consultation with Government of India to allow foreign investment in infrastructure Companies in Securities Markets, namely stock exchanges, depositories and clearing corporations, in compliance with SEBI Regulations and subject to the following conditions:

i) Foreign investment upto 49 per cent will be allowed in these companies with a separate Foreign Direct Investment (FDI) cap of 26 per cent and Foreign Institutional Investment (FII) cap of 23 per cent;
ii) FDI will be allowed with specific prior approval of FIPB Board; and
iii) FII will be allowed only through purchases in the secondary market.

3. AD Category – 1 banks may bring the contents of this circular to the notice of their constituents and customers concerned.

4. Necessary amendments to the Foreign Exchange Management (Transfer or issue of Security by a Person Resident Outside India) Regulations, 2000 are being issued separately.

5. The directions in this circular have been issued under Sections 10(4) and 11 (1) of Foreign Exchange Management Act, 1999 (42 of 1999) and is without prejudice to permissions/approvals, if any, required under any other law.

Yours faithfully,
(Salim Gangadharan)
Chief General Manager-in-charge"

2. The petitioner, an Advocate, has challenged the legality of the above circular in the present writ petition and has prayed that the said circular be quashed.

3. It is contended on behalf of the petitioner that the said circular is unconstitutional, without jurisdiction and is *ultra vires* the

provisions of Foreign Exchange Management Act, 1999 (hereinafter referred to as “the Act”) and Rules framed thereunder, as no power is vested under Section 10 (4) and 11 (1) of the Act which empowers and authorises the Reserve Bank of India to issue such circulars. On the basis of the averments made in the petition, the petitioner has also raised an issue that the Stock Exchange is not an infrastructure Company but is a regulatory body and it cannot be allowed to function for profit. The impact of the impugned circular is putting restrictions on the trade activities of the general corporate sector which does not fall within the ambit and scope of the Reserve Bank of India. The Government of India took a policy decision and vide circular dated 22nd December, 2006, issued by Securities and Exchange Board of India, it has been decided to permit foreign investment subject to the restrictions and classifications made in that Circular. The circular reads as under:-

> “1. The Government of India has decided to have the following policy regarding foreign investments in infrastructure companies in the securities markets, namely stock exchanges, depositories and clearing corporations.
>
> a) Foreign investment upto 49% will be allowed in these companies with a separate Foreign Direct Investment (FDI) cap of 26% and Foreign institutional investment (FII) cap of 23%.
>
> b) FDI will be allowed withspecific prior approval of FIPB;
>
> c) FII will be allowed only through purchases in the

secondary market;

d) FII shall not seek and will not get representation on the Board of Directors;

e) No foreign investor, including persons acting in concert, will hold more than 5% of the equity in these companies.

2. Necessary amendments to the respective regulations are being issued separately by SEBI and RBI in this regard.

3. The aforesaid limits for foreign investment in respect of recognised stock exchanges shall be subject to the limit of 5% shareholding by any person, directly or indirectly, as prescribed under the Securities Contracts (Regulation) (Manner of Increasing and Maintaining Public Shareholding in Recognised Stock Exchanges) Regulations, 2006.

4. This circular is being issued for information and necessary compliance by the concerned entities".

4. After issuance of the said circular, the Reserve Bank of India issued the impugned circular by way of directions as contemplated under Sections 10 (4)and 11 (1) of the Act. A bare reading of these provisions clearly show that the Reserve Bank of India has the power to issue directions to the authorised persons and this power is wide enough to cover any kind of directions so far it provide for the regulation of the Foreign Exchange management. We are unable to find any merit in the contention raised on behalf of the petitioner that the Reserve Bank of India has no jurisdiction to issue such circulars. Section 10 (4)

of the Act clearly stipulates that an authorised person shall, as contemplated under Section 10 (1) of the Act, in all his dealings is bound by the directions, general or special, issued by the Reserve Bank of India. Similarly, Section 11 (1) of the Act provides that the Reserve Bank of India may, for the purpose of securing compliance with the provisions of the Act and of any Rules, Regulations and directions made under the provisions of the Act, give to the authorised persons any direction in regard to making of payment or the doing or desist from doing of any act relating to foreign exchange or foreign security.

5. The National Stock Exchange of India is a Limited Company duly incorporated under the provisions of the Companies Act. Under clause (2) of the impugned circular, the Reserve Bank of India in consultation with the Government of India allowed foreign investment in infrastructure Companies in securities markets namely Stock Exchanges, depositories and clearing corporations. It is clear from the above that there could be no restriction in application of the circular to respondent No.4. We are unable to accept the contention raised on behalf of the petitioner that the expression “infrastructure companies” would have to be distinctly read from the expressions appearing immediately thereafter and that would result in its non-application to

respondent No.4.

6. Furthermore, the present petition would hardly satisfy the test of a public interest litigation. It needs to be examined as to what is the locus standi of the petitioner to file the present litigation. The averments made in the writ petition are vague. The Court also have to notice the fact that the circular was issued as far back as on 22nd December, 2006, while the present petition has been filed in June, 2007, after a considerable delay and that too without rendering any plausible explanation for such inordinate delay. Obviously, the circular has been given full effect to by all concerned. The Reserve Bank of India has already issued directions in furtherance to the policy decision taken by the Central Government. The petitioner has not challenged in the present writ petition the policy decision of the Central Government but has merely questioned the incidental act i.e. the impugned circular. In any event, these are policy decisions which fall within the domain of the authorities concerned in the Central Government. The effects and repercussions of such policy decision can hardly be subject matter of judicial review. Policy decisions, unless and until are reversed or are inconsistent with the constitutional mandate or are patently abuse of power, judicial intervention would normally be not necessitated.

Reference can be made to the judgments in *Balco Employees' Union (Regd.)* vs. *Union of India and others,* (2002) 2 SCC 333 and *Federation of Railway Officers Association and others* vs. *Union of India, (2003) 4 SCC 289*. The present case certainly does not fall in any of the classes clarified in the Supreme Court's dicta in these judgments.

7. For the aforestated reasons, the petition is dismissed, however, without any order as to costs.

CHIEF JUSTICE

DR. D.Y. CHANDRACHUD, J.